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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

511 OFW, L.P.,

Plaintiff and Appellant,

v.

FIRST FEDERAL BANK OF  
CALIFORNIA,

Defendant and Respondent.

B209057

(Los Angeles County  
Super. Ct. No. SC098012)

APPEAL from an order of the Superior Court of Los Angeles County, Ann I.  
Jones, Judge. Affirmed.

Bostwick & Jassy, Gary L. Bostwick, Jean-Paul Jassy; Westlake Law Group and  
David Blake Chatfield, for Plaintiff and Appellant.

Epport, Richman & Robbins, Steven N. Richman and Lawrence A. Abelson for  
Defendant and Respondent.

## I. INTRODUCTION

Plaintiff, 511 OFW, L. P., appeals from an order denying a request for injunctive relief. Plaintiff sought to restrain defendant, First Federal Bank of California, from issuing a beneficiary payoff statement. The payoff statement related to a loan secured by commercial property owned by plaintiff. According to plaintiff, the payoff statement contains dollar amounts which exceed the balance owed on the loan. Plaintiff contends that defendant improperly included in the payoff statement attorney fees and costs arising out of a separate action entitled *Stephen M. Gaggero v. First Federal Bank of California* (Super. Ct. L.A. County, No. BC257767) (“the Gaggero litigation”). We conclude the order must be affirmed. Because the trial court did not abuse its discretion in denying the preliminary injunction request because plaintiff has an adequate legal remedy, we affirm the order under review.

## II. BACKGROUND

On April 29, 2008, plaintiff filed a declaratory relief complaint which contained the following allegations. Plaintiff, a limited partnership, is the owner of real property located at 511 Ocean Front Walk in Venice, California. The property is subject to a mortgage held by defendant with principal and interest currently due in the amount of approximately \$793,626. Defendant imposed an improper and illegal \$3,463,992 lien on plaintiff’s property. According to the complaint, defendant demanded this additional amount from plaintiff. The lien resulted from litigation between Mr. Gaggero and defendant.

According to the complaint, in 1990, Mr. Gaggero was the owner of four contiguous properties located on Ocean Front Walk including 511 and 517 Ocean Front Walk. Mr. Gaggero and defendant entered into loan agreements on three of the properties. The loan number was 000-9609223. In 1994, one of the three loans was paid

off after a dispute arose between Mr. Gaggero and defendant. The disputes as to 511 and 517 Ocean Front Walk were litigated resulting in an award of \$1.2 million in Mr. Gaggero's favor.

The complaint further alleged that, in 1997, Mr. Gaggero transferred title to the Venice properties to family owned limited partnerships as a part of an estate plan. The 511 Ocean Front Walk property is now owned by plaintiff. Defendant claimed the 1997 title change was an unauthorized transfer. As a result, defendant required that plaintiff enter into an assumption agreement. The assumption agreement was executed on June 4, 1999. The assumption agreement provides in part that plaintiff would assume the 1990 note and deed of trust for the 511 Ocean Front property, loan No. 000-9609223. According to the assumption agreement, Mr. Gaggero is the managing general partner of plaintiff. In 2006, the loan on the 517 Ocean Front Walk property was paid off but defendant did not demand any outstanding fees in the payout amount.

In June 2007, plaintiff tendered the full amount to defendant of all amounts owed on the 511 Ocean Front Walk property. Defendant refused the June 2007 tender. In 2008, plaintiff requested a beneficiary demand statement on the 511 Ocean Front Walk property. In an April 4, 2008 payoff statement, defendant listed as outstanding fees \$3,463,992. In a cover letter accompanying the April 4, 2008 payoff statement, defendant asserted the fees and costs were awarded in the Gaggero litigation. Plaintiff alleged that it was not a party to the Gagerro litigation. Plaintiff alleged there was an appeal and cross-appeal from the judgment in the Gagerro litigation. In any event, plaintiff alleged that defendant had only been awarded fees and costs totaling \$1,606,873.43 in the Gaggero litigation which was far less than the demand in the payoff statement in the amount of \$3,463,992.

Defendant refused plaintiff's request to remove the outstanding fees from the payoff statement. Defendant claimed the \$3,463,992 demand was authorized pursuant to paragraph 9 of the trust deed which provides: **"Protection of Lender's Security.** If Borrower fails to perform the covenants and agreements contained in this Deed of Trust

or if any action or proceeding is commenced which affects the Property or title thereto or the interest of Lender therein, including, but not limited to, eminent domain, insolvency, code enforcement, or arrangements or proceedings involving a bankrupt or decedent then Lender at Lender's option may make such appearances, disburse such sums and take such action as Lender deemed necessary, in its sole discretion, to protect Lender's interest, including, but not limited to, (i) disbursement of attorney's fees; (ii) entry onto the Property to make repairs; (iii) procurement of satisfactory insurance as provided in paragraph 4 hereof and (iv) if this Deed of Trust is a leasehold, exercise any option to renew or extend the ground lease on behalf of Borrower and curing any default by borrower in the terms and conditions of the ground lease. [¶] Any amounts disbursed by Lender pursuant to this paragraph 9, with interest thereon, shall become additional indebtedness of Borrower secured by this Deed of Trust. Unless Borrower and Lender agree to other terms of payments, such amounts shall be immediately due and payable and shall bear interest from the date of disbursement at the Default Rate."

Plaintiff asserted that a controversy existed between the parties concerning their rights under the loan documents and the trust deed. Further, there was a controversy as to whether defendant was entitled to claim attorney fees and costs in defense of the Gaggero litigation. Plaintiff sought a declaration that defendant had no right to add attorney fees and costs in any pending litigation related to the loan balance.

On May 1, 2008, plaintiff filed an application for a temporary restraining order and for an order to show cause why defendant should not be restrained from issuing a beneficiary payoff statement which exceeded the amount owed on the loan and included attorney fees and costs from the Gaggero litigation. In support of the application, Joseph Praske declared that he is the trustee of the general partner of plaintiff. Mr. Praske receives notices for the 511 Ocean Front Walk property. Mr. Praske works with Pacific Coast Management and Mr. Gaggero in managing plaintiff's property. Mr. Praske was involved in financing of the property and worked with counsel regarding the property. Mr. Praske reiterated the allegations in the complaint about the: 1990 loan agreement;

June 4, 1999 loan assumption agreement; and note and trust deed for the 511 Ocean Front Walk property. Mr. Praske also verified that plaintiff had attempted to tender the full amount of the principal and interest owed on the loan to defendant. However, defendant had refused to accept the tender claiming that the charge of \$3,463,992 in outstanding fees was proper due to the Gaggero litigation. According to Mr. Praske, plaintiff was not a party to the Gaggero litigation. Mr. Praske declared that, if the demand for the outstanding fees is not removed, it will make it impossible to refinance, pay off, leverage, sell, or otherwise alienate the property.

Plaintiff's points and authorities assert: defendant had no legal or equitable basis for including the fees and costs from the Gaggero litigation; defendant added the attorney fees and costs even though the case was dismissed prior to trial; further, in the Gaggero litigation defendant was found not to be the prevailing party for purposes of contractual attorney fees pursuant to Civil Code section 1717; fees and costs in the Gaggero litigation were awarded for defending against tort claims; and both parties in the Gaggero appealed the award. Plaintiff's points and authorities further argued: defendant's conduct in adding the fee and costs amounts to a constitutional taking without due process of law; defendant did not comply with the attachment law (Code Civ. Proc., § 481.10 et seq.); the addition of attorney fees and costs to the payoff statement was not permitted under the terms of the trust deed; paragraph 9 of the trust deed provides security for a debt that is due, it does not allow defendant to unilaterally add any claim to the debt; and paragraph 9 also requires the borrower to pay fees in the event the borrower fails to protect the property from third parties by allowing defendant to defend the property against third party claims. Plaintiff argued that paragraph 9 of the trust deed was inapplicable because defendant took no action in the Gaggero litigation to protect the value of the 511 Ocean Front Walk property or its security interest from third parties. In the Gaggero litigation, defendant was defending against tort claims and contract breach claims. Finally, plaintiff asserted it would be irreparably harmed unless injunctive relief was provided. Plaintiff contended that the addition of the fees to the

payoff statement would prevent it from refinancing, selling, or otherwise disposing of the property. This would thereby violate plaintiff's constitutional right to alienate its property free from any wrongful liens of third parties. The temporary restraining request was denied. But an order to show cause re preliminary injunction was issued and set for hearing on May 29, 2008.

Defendant sought judicial notice of 22 separate documents. First, defendant sought judicial notice of certain papers filed in the case of Gaggero litigation. On or about May 30, 2007, Mr. Gaggero sought a preliminary injunction, or in the alternative, a temporary restraining order. Mr. Gaggero sought to have defendant issue a beneficiary pay-off statement which did not contain its claimed attorney fees. Mr. Gaggero's ex parte request was denied. Mr. Gaggero then filed a request to have a referee appointed to determine the validity of the issues raised by the inclusion of \$2,464,532.93 in the payoff statement. The ex parte motion for appointment of a referee was denied. Mr. Gaggero later filed a noticed motion for a restraining order or preliminary injunction which sought the deletion of the attorney fees and costs from the beneficiary statement. On July 3, 2007, Mr. Gaggero's motion was denied. On September 18, 2007, Mr. Gaggero filed a request to dismiss the Gaggero litigation. On March 24, 2008, defendant received its attorney fees and costs in the sum of \$1,606,873.43 in the Gaggero litigation.

Second, defendant requested judicial notice of documents filed in the case of *511 OFW, L.P. v. First Federal Bank of California* (Super. Ct. L.A. County, No. BC373336). On June 26, 2007, in case No. BC373336, plaintiff filed a complaint against defendant. In the complaint, plaintiff sought declaratory relief as to a loan funded by defendant. The loan encumbered the same property involved in this case. On May 8, 2007, plaintiff requested a statement of the balance owed on the loan. According to the complaint in case No. BC373336, the payoff statement was backdated, failed to comply with Civil Code section 2943, subdivision (b)(1), and inaccurately included a charge of \$2,464,532.93 for attorney fees. Plaintiff asserted it was not responsible for the \$2,464,532.93 in attorney fees and sought a declaration to that effect. Plaintiff also

alleged that defendant's inclusion of the \$2,464,532.93 in attorney fees in the payoff statement constituted a contract breach and a violation of the implied covenant of good faith and fair dealing. On June 28, 2007, plaintiff sought issuance of a temporary restraining order and a preliminary injunction to compel defendant to remove any fees or costs from the payoff statement for the loan funded by defendant. On June 28, 2007, the application was denied without prejudice. On September 10, 2007, plaintiff again sought issuance of a temporary restraining order and a preliminary injunction which sought to compel defendant to remove any fees or costs from the payoff statement for loan No. 000-960922-3. On September 10, 2007, the temporary restraining order request was denied. But an order to show cause re: preliminary injunction was issued. On October 16, 2007, the preliminary injunction request was denied. On November 30, 2007, a hearing was held on defendant's request for appointment of a receiver. At the conclusion of the hearing, defense counsel requested that the motion for appointment of a receiver be taken off calendar.

In addition to the judicially noticed documents, defendant relied on the declaration of Lawrence A. Abelson, one of its attorneys, as part of the opposition to the present preliminary injunction request. Mr. Abelson stated: the Gaggero action was dismissed prior to trial by means of a voluntary dismissal; attorney fees were awarded in defendant's favor and against Mr. Gaggero in the sum of \$1,606,873.43; on March 19, 2008, plaintiff requested a payoff statement on the "subject loan"; on April 4, 2008, defendant served a payoff statement which included \$3,463,922 in attorney fees incurred in the Gaggero action and in case No. BC373336; and the latest payoff statement was consistent with the prior statements. And Mr. Abelson's declaration explained the need for a bond in the event a preliminary injunction issued and settlement options.

Defendant opposed the preliminary injunction request on the grounds: it was entitled to add the attorney fees and costs to the payoff statement; this was because they were incurred in enforcing its rights and protecting its interests under the loan documents; and plaintiff was "forum shopping" because two other judges had denied the relief sought

in the current application on at least seven prior occasions in two different lawsuits. Defendant cited as examples of prior adverse rulings on this issue: the 2007 ex parte application for injunctive relief and two related ex parte applications seeking the appointment of a special master to consider the original application and order shortening time for hearing on motion for preliminary injunction all of which were denied; a noticed motion for prohibitory preliminary injunction which was denied on July 3, 2007; and in case No. BC373336 filed by Mr. Gaggero in plaintiff's name, injunctive relief requests filed on June 26, September 10, and October 16, 2007, which were denied on each occasion. Defendant contended these prior rulings required the present preliminary injunction motion be denied under res judicata or collateral estoppel principles.

Defendant argued that the loan documents coupled with the trust deed gave it the right to add the attorney fees and costs in the payoff statement. Defendant cited paragraph 8(e) of the note and paragraph 9 of the trust deed. Paragraph 8(e) states: **“Payment of Note Holder’s Costs and Expenses.** [¶] If the Note Holder has required me to pay immediately in full as describe above, the Note Holder will have the right to be paid back by me for all its costs and expenses in enforcing this note to the extent not prohibited by applicable law. Such expenses include, for example, reasonable attorney’s fees.” In addition to paragraph 8(e) of the note and paragraph 9 of the trust deed, defendant cited the following language from the trust deed which provides: “This Deed of Trust secures to Lender: (a) the repayment of the debt evidenced by the Note with interest and all renewals, extensions and modifications; (b) the payment of all sums, with interest, advanced under paragraph 6 to protect the security of this Deed of Trust; (c) the performance of borrower’s covenants and agreements under this Deed of Trust and the Note; . . . (g) the performance of any agreement of Borrower to pay fees and charges to Lender whether or not set forth in this Deed of Trust.”

Defendant further argued that plaintiff was not entitled to any provisional remedy because it could not demonstrate irreparable injury. Rather, defendant asserted that if a preliminary injunction issued, it would suffer irreparable harm. This is because:

defendant would be forced to give up its security without being paid; defendant would lose its security or senior lien; and a new lender would have a security in the property.

A hearing on plaintiff's application for injunctive relief was held on June 3, 2008. At the hearing, the trial court ruled: plaintiff had failed to show irreparable harm; plaintiff had adequate alternative remedies rather than the extraordinary relief it sought; plaintiff could bond the amount of attorney fees and costs allegedly owed and then sell the property; plaintiff could sue for damages; or plaintiff could pay the amount with a reservation of rights. By contrast, the trial court found that defendant would be irreparably harmed if the request for injunctive relief were granted. Plaintiff's timely appeal followed.

### III. DISCUSSION

Plaintiff contends the trial court erred in denying the preliminary injunction request. Our Supreme Court has stated: "[T]rial courts should evaluate two interrelated factors when deciding whether or not to issue a preliminary injunction. The first is the likelihood that the plaintiff will prevail on the merits at trial. The second is the interim harm that the plaintiff is likely to sustain if the injunction were denied as compared to the harm that the defendant is likely to suffer if the preliminary injunction were issued. [Citations.]" (*IT Corp. v. County of Imperial* (1983) 35 Cal.3d 63, 69-70; accord *White v. Davis* (2003) 30 Cal.4th 528, 554; *Jay Bharat Developers, Inc. v. Minidis* (2008) 167 Cal.App.4th 437, 443.) A decision to grant or deny a preliminary injunction request rests within the sound discretion of the trial court. (*Cohen v. Board of Supervisors* (1985) 40 Cal.3d 277, 286 citing *IT Corp. v. County of Imperial*, *supra*, 35 Cal.3d at p. 69.) The determination will not be reversed on appeal absent a showing of a manifest abuse of discretion. (*Cohen v. Board of Supervisors*, *supra*, 40 Cal.3d at p. 286; *Continental Baking Co. v. Katz* (1968) 68 Cal.2d 512, 527.) Before equitable relief will be granted, there must be a demonstration of irreparable injury by the party seeking the injunction

and a showing that damages are inadequate. (Code Civ. Proc., §526, subd. (a)(2), (4) & (5); *Wilkison v. Wiederkehr* (2002) 101 Cal.App.4th 822, 831-832; *Friedman v. Friedman* (1993) 20 Cal.App.4th 876, 889; *Thayer Plymouth Center, Inc. v. Chrysler Motors Corp.* (1967) 255 Cal.App.2d 300, 306.)

Here, the trial court found that plaintiff had not established either irreparable injury in that money was an inadequate remedy or that plaintiff had a substantial probability of prevailing on the merits. The trial court ruled: the evidence only established plaintiff would suffer a monetary loss; plaintiff had failed to show irreparable harm; and defendant would suffer irreparable harm if plaintiff received the requested relief. Plaintiff claims that it would suffer a pecuniary loss if it cannot sell or refinance its commercial real property in a timely manner. However, without abusing its discretion, the trial court could find if plaintiff ultimately prevails on the issue of rights under the note and trust deed, the amount of any such loss is ascertainable and could be proved by testimony at a trial. The trial court could have reasonably ruled plaintiff would not suffer any irreparable injury because defendant would be required to provide monetary compensation for any injury caused by the claim for attorney fees in the payoff statement. Thus, it was not an abuse of discretion for the trial court to rule that damages would be an adequate remedy at law should plaintiff ultimately prevail. (Code Civ. Proc., §526; *AIU Ins. Co. v. Superior Court* (1990) 51 Cal.3d 807, 838-839.)

#### IV. DISPOSITION

The order denying the preliminary injunction is affirmed. Defendant, First Federal Bank of California, is awarded its costs on appeal from plaintiff, 511 OFW, L.P.

TURNER, P. J.

We concur:

ARMSTRONG, J.

MOSK, J.